NATIONAL UNION OF TEACHERS IN INDEPENDENT SCHOOLS, WEST MALAYSIA

v.

HAN CHIANG HIGH SCHOOL, PENANG

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[CIVIL APPEAL NO. R8-16-18-88]
27 JANUARY 1989

LABOUR LAW: *Reference to High Court under s. 33A(1) Industrial Relations Act 1967 - Two disputes of collective agreement and wrongful dismissal - Question of whether union had locus standi - Whether Industrial Court had jurisdiction to determine dispute not referred to it.*

The appellant ("the union") and the respondent ("the school") were involved in two disputes - one was a dispute over a collective agreement on wages and terms and conditions of employment for the teachers employed in the school which was referred to the Industrial Court by the Minister of Labour on 12 January 1987 for adjudication and the other was a dispute over the alleged wrongful dismissal of 35 teachers which was referred to the Industrial Court on 14 August 1987. In the instant case, the Industrial Court was concerned only with the dispute over the collective agreement while the dispute over the alleged wrongful dismissal of 35 teachers is before another division of Court.

The school raised a preliminary issue that the union had no *locus standi* to represent the teachers in the instant case. The Industrial Court made a finding that although the school had not closed down, and was still in operation at the date of hearing, there was not a teacher employed by the school who was a union member because those who were union members had either resigned from the union or because their contracts were not renewed by the school. The Industrial Court held that the union could not represent and act in a dispute on behalf of the school teachers who were not its members or no longer its members, and so the union had no *locus standi* before the Court.

The union being dissatisfied with this award obtained leave from the Industrial Court to refer four questions of law to the High Court under s. 33A of the Industrial Relations Act 1967.

Held:

[1] In holding that the union had no *locus standi* because it no longer had any member, the Industrial Court was in fact adjudicating the dispute of wrongful dismissal of the teachers who were union members, and had come to the conclusion that the teachers' services had been lawfully terminated.

[2] The Industrial Court had no jurisdiction to determine that dispute, because that very dispute had not been referred to it by the Minister, but to another division of the Industrial Court to adjudicate.

[3] The finding by the Court that the union had no members was wholly unsupported by evidence. The Court had therefore reached that finding by assuming erroneously that because no union member was present before it on 27 February 1988, the union had no member to represent.

[4] Since the Industrial Court had knowledge that the dispute over the wrongful dismissal and the reinstatement of the teachers was being inquired into by another division of the Industrial Court, the Court should have stayed further proceedings on the question of *locus standi* of the union until final determination of the dispute over the re-instatement.

[Appeal allowed, award quashed and further ordered that another division of the Industrial Court shall hear this dispute.]

Case referred to:

Reading & Bates (M) Sdn. Bhd., Miri v. Sarawak Union of Lands & Offshore Drilling Workers [1987] 1 LR 299

Legislation referred to:

Industrial Relations Act 1967, ss. 9(2), (5), 30(3), 33A(1), (5)

For the appellant - M/s. Lobo & Associates
For the respondent - M/s. Shook Lin & Bok

JUDGMENT

Eusoff Chin J:

The appellant in this case being dissatisfied with award No. 49/88 handed down by the Chairman of the Industrial Court on 27 February 1988, had applied under s. 33A(1) of the Industrial Relations Act 1967 (IRA) for 9 questions of law to be referred to the High Court.

On 4 May 1988, the Industrial Court granted leave, and agreed to refer to the High Court 4 of the 9 questions which are as follows:

1. ...

2. Whether or not the Industrial Court erred in law when it held that s. 32 of the Industrial Relations Act 1967 (the Act) has no relation to the *locus standi* of the union when (on its own finding) at least as at the date of the hearing the applicant represented at least 35 of its members in Court.

3. Whether or not the Industrial Court erred in law when it concluded that "... all the teachers who were union members therein had either resigned from the union or had left the school because their contracts were not renewed ..." without evidence being led by the respondent on whether or not there are in fact union members still in the employ of the respondent at any particular point in time or date.

4. Whether or not the Industrial Court erred in law and/or exceeded its jurisdiction in holding that (at para. 7) "... all the teachers who were union members therein had ... **left** the school because their contracts were not renewed." When (at para. 5) it had held that "... thirty-five (of the teachers) had their services **terminated** by way of non-renewal of their contracts ..." since the reference by the Minister of Labour in question under which the Industrial Court purported to make the said award was a trade dispute between the applicant and the respondent over failure to reach a collective agreement on terms and conditions of employment.

5. Whether or not in making the said award the Industrial Court misdirected itself in law in failing to take into account the undisputed fact and its own finding that at least the thirty-five teachers whose dismissals were the subject matter of another trade dispute pending adjudication before another division of the Industrial Court were and are members of the applicant at all material times.

6. ...

7. ...

8. ...

9. ...

Before me there were some arguments as to the jurisdiction and powers of the High Court when hearing an appeal under s. 33A of the Industrial Relations Act, i.e. whether the High Court is limited to determine only questions referred to it. For the purposes of this appeal it is sufficient to quote s. 33A(1) and (5) of the Industrial Relations Act which states:

> 33A. (1) Where the Court has made an award under s. 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law:
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> (a) which arose in the course of the proceedings;
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> (b) the determination of which by the Court has affected the award,
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> (c) which, in the opinion of the Court, is of sufficient importance to merit such reference; and
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> (d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference.
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> (5) The High Court shall hear and determine the question referred to it under this section as if the reference were an appeal to the High Court against the award of the Court, and may, consequently, confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary.

It appears that on the application of any party to the proceedings in which the award is made, the Industrial Court is not bound to refer any question of law to the High Court under s. 33A(1) of the Industrial Relations Act, unless the Industrial Court is satisfied that that question is one which fulfils all the conditions provided in that section. In exercising its power to refer or not to refer a question to the High Court, the Industrial Court will have to do so judiciously. But once a question is referred to the High Court, the reference will be treated as if it were an appeal to the High Court, and each question referred to the High Court will be treated as a ground of appeal. Under subsection (5) of s. 33A of the Industrial Relations Act, the High Court will hear and determine the reference as if it is hearing an appeal from a lower Court.

The facts of the case under appeal are as follows:

The dispute is between the Han Chiang High School, Penang (hereinafter referred to as "the school") and the National Union of Teachers in Independent Schools, West Malaysia (hereinafter referred to as "the union") over their failure to conclude a collective agreement on wages and terms and conditions binding on them.

Han Chiang High School, Penang was first established in 1951. Its main objective is to cater for Chinese students who are unable to get admittance into the national type schools. It employed teachers on a fixed term basis, subject to renewal on terms as follows:

> In the event of this contract being renewed, the teacher must notify the managing committee of his/her acceptance within one week from the date the renewal of the contract is offered. Otherwise the offer is deemed to have been rejected.
>
> 6. If anyone does not receive any offer of the contract being renewed by the date of expiry of the contract, it will mean that his/her service has been terminated. The school takes no responsibility to inform him/her cessation of his/her employment.

Some of the teachers' contracts have been renewed under these terms for more than twenty years.

During the year 1985/86, the school had in its employ eighty-three teachers. Sometime in 1985, fifty-three of these teachers joined the union and, on 2 July 1985, the union submitted to the school a claim for recognition under s. 9(2) of the Industrial Relations Act 1967. There was no response to the union's claim for recognition and, on 28 August 1985 the union reported the matter to the Director General of Industrial Relations. By a notice dated 23 August 1986, the Minister of Labour accorded recognition to the union and directed the school to take notice of such recognition under s. 9(5) of the Act. On 21 October 1986, the union submitted a proposal on wages and terms and conditions to the school with a view to entering into a collective agreement binding on them. But there was no response to the union's proposal. On 28 November 1986, the school decided not to renew the contracts of all the teachers who were members of the union. Each of these teachers received identical notices, as follows:

> Dear Sir/Madam,
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> As instructed by the board of directors, we would like to inform you that your service agreement with the school will be expired on 31 December 1986.
>
> The board of directors would like to take this opportunity to thank you for your service to the school.

On 17 December 1986, the union applied to the High Court, Penang for an injunction restraining the school from terminating the services of the teachers who were served with the notice. On 2 January 1987, the High Court in Penang granted injunction prayed for by the union. The school then filed an appeal against the decision of the High Court.

In 14 July 1987, the Supreme Court allowed the appeal of the school and set aside the injunction of 2 July 1987. In its written judgment dated 23 November 1987, the Supreme Court added that the Industrial Court was the proper forum to deal with complaints of wrongful dismissal since it was empowered by the Act to order the employer to reinstate the workman to his former position or a similar position if the Industrial Court should hold that the dismissal was without just cause or excuse.

The school and the union were then locked in two disputes - one was a dispute over a collective agreement on wages and terms and conditions of employment for the teachers employed in the school, and the other was a dispute over the alleged wrongful dismissal of thirty-five teachers. The dispute over collective agreement was referred to the Industrial Court by the Minister of Labour on 12 January 1987 for adjudication and the dispute over alleged wrongful dismissal of thirty-five teachers was referred to the Industrial Court on, 14 August 1987. In the instant case, the Industrial Court is concerned only with the dispute over the collective agreement. The dispute over the alleged wrongful dismissal of thirty-five teachers is before another division of the Court.

At the hearing in the Industrial Court on 27 July 1987 and 28 January 1988, the school raised a preliminary issue that the union had no *locus standi* to represent the teachers in the instant case, as it contended that none of the teachers in the school was a member of the union because out of fifty-three teachers who were members of the union, eighteen had resigned from the union on various dates and thirty-five had their services terminated by way of non-renewal of their contracts. The school then relied on the case of *Reading & Bates (M) Sdn. Bhd., Miri v. Sarawak Union of Lands & Offshore Drilling Workers* [1987] 1 ILR 299 to

support its contention. The union, on the other hand, submitted otherwise, contending that the case of *Reading & Bates (M) Sdn. Bhd.* could be distinguished, as there was no closures of the school here.

In *Reading & Bates (M) Sdn. Bhd.*, the Industrial Court held that, since the company had closed down and all its employees had left its service, the union had no *locus standi* as it did not represent anyone in the company over the dispute between the company and the union on collective agreement.

The Industrial Court here made a finding that although the school had not closed down, and was still in operation at the date of hearing, there was not a teacher employed by the school who was a union member because those who were union members had either resigned from the union or because their contracts were not renewed by the school. The Industrial Court held that the union could not represent and act in a dispute on behalf of the school teachers who were not its members or no longer its members, and so the union had no *locus standi* before the Court.

As stated earlier, the dispute concerning the alleged wrongful dismissal of the thirty-five teachers who were union members was referred to another division of the Industrial Court by the Minister on 14 August 1987. That division had not determined and made an award in respect of the dispute on 27 February 1988, when the question of *locus standi* of the union was heard by the Industrial Court. In holding that the union has no *locus standi* because it no longer had any members, the Industrial Court was in fact adjudicating the dispute of wrongful dismissal of the teachers who were union members, and had come to the conclusion that the teachers' services had been lawfully terminated. This Industrial Court had no jurisdiction to determine that dispute, because that very dispute had not been referred to it by the Minister, but to another division of the Industrial Court to adjudicate. Further, the finding by the Court that the union had no members was wholly unsupported by evidence. The Court had therefore reached that finding by assuming erroneously that because no union member was present before it on 27 February 1988, the union had no member to represent.

It was argued before me that the Industrial Court had to make its award without delay under s. 30(3) of the Industrial Relations Act which states :

> 30.(3) The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under s. 20(3).

The dispute over the collective agreement was referred to the Industrial Court by the Minister on 12 January 1987 and the award on *locus standi* of the union was made on 27 February 1988. As it is, there had been already some delay. But under the circumstances, since the Industrial Court had knowledge that the dispute over the wrongful dismissal and the reinstatement of teachers was being inquired into by another division of the Industrial Court, the Court should have stayed further proceedings on the question of *locus standi* of the union until final determination of the dispute over the reinstatement.

I allow the appeal with costs, quash the award and make the further order that another division of the Industrial Court shall hear this dispute.

Also found at [1989] 1 CLJ 1091